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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 299

THOMAS M. KAVANAGH and
EUGENE F. BLACK,
Appellants,

v.

SANFORD A. BROWN, Treasurer of Michigan, et al.,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

BRIEF OPPOSING MOTION TO AFFIRM

THOMAS M. KAVANAGH,
The Capitol,
Lansing, Michigan;

EUGENE F. BLACK,
County-City Building,
Port Huron, Michigan,
(members of the Bar of the Supreme Court, appearing in their own behalf).

SUBJECT INDEX

Discussion Points

	Page
First: The Michigan Supreme Court's 1957 Communication to the Legislature	2-6
Second: The Taylor Case	7
Third: The Attorney General's Treatment of the "Except Circuit Judges" Exemption	8-9
Fourth: The Point that Michigan Supreme Court Justices So Far Have "Acquiesced"	9-10
Conclusion	10-12

CASES CITED

Dahnke-Walker Co., v. Bondurant, 257 US 282, 289	6
Fleming v. Rhodes, 331 US 100, 104	6
Florida Lime and Avocado Growers v. Jacobsen, 362 US 73, 84	6
O'Donoghue v. United States, 289 US 516, 532	10
Taylor v. Auditor General, 360 Mich 146	7
Taylor v. Auditor General, 342 Mich 265	7
Taylor v. State of Michigan (Sept. 7, 1962)	7
Yick Wo v. Hopkins, 118 US 356, 373, 374	6

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FOREWORD

The present and overdue abandonment, by the Michigan attorney general's department, of its Eleventh Amendment attack upon the jurisdiction, and that department's present appeal to the merits by motion to affirm, require this otherwise unnecessary brief in opposition. Until today the department's primary defense has been the alleged want of jurisdiction. Now, by the motion and the provisions of

Rule 16, §1(c), the sole issue is whether the presented questions "are so unsubstantial as not to need further argument."

The decisions of this Court which, under the equality clause, lay down rules by which facts are tested for discrimination of invidious character, require no review in a Rule 16 brief which adjuredly must be short. They simply point up Mr. Justice Cardozo's penetrating realism:[1] that the facts themselves—once they are known—determine the presence or absence of actionable inequality.

For convenience of compared reading we shall treat in the same order the seeming worthy points made in the attorney general's motion.

FIRST: The Michigan Supreme Court's 1957 Communication to the Legislature (pp. 4 and 5 of motion to affirm)

In his motion the attorney general refrains artfully from advising that the fact of such communication, and of its arrant frustration by the Legislature, *was brought into this case exclusively by plaintiff-appellants and relied upon by them as judicially resolved evidence of the very discrimination he, the attorney general, would have this Court deny.* Now, since the attorney general brings the Court's communication forth and then leaves it hastily, let us examine the meat thereof. It proceeds connectedly:

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[1] "More and more, we lawyers are awaking to a perception of the truth that what divides and distracts us in the solution of a legal problem is not so much uncertainty about the law as uncertainty about the facts—the facts which generate the law. Let the facts be known as they are, and the law will sprout from the seed and turn its branches toward the light." (Mr. Justice Cardozo, quoted in 'The Art of Advocacy', by Lloyd Paul Stryker, p 11,—Simon and Schuster—1954.)

> "Currently two, and in recent times three different salary scales have been in effect for different members of this Court. With eight year, staggered terms it is inevitable that that situation will obtain for a number of years following each salary change, because of the provision of Section 3 of Article 16 of the state Constitution, prohibiting such change from taking effect during term of office. The proposed amendment herewith submitted would correct that situation and serve to equalize the salaries of all members of the Court by making any increase applicable to all at the same time at the beginning of the next fiscal year.
>
> "It is manifestly inequitable and improper that the amount of compensation paid some Justices should differ from that paid others for performance of the same service. Furthermore, the rapidity of economic change since World War II and extent thereof occurring within a span of eight years are such that adequate compensation at the outset of an eight year term becomes grossly inadequate long before its expiration."[2]

The foregoing quotation is taken from untraversed paragraph 8 of plaintiff-appellants' complaint. Paragraph 8 proceeds:

> "No reply to or acknowledgment of this communication was ever given or made by the legislature, or any committee thereof, to the Michigan Supreme Court. The communication was, so far as plaintiffs have been able to learn, totally ignored by the legislature. A similar and more vigorous effort on the part of the State Bar of Michigan, to correct the iniquitous and discriminatory impact of the presently attacked state statutes, met with

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[2] Yes, this is the Supreme Court of Michigan, testifying unanimously to the iniquity the attorney general moves to have blessed summarily.

similar legislative disinterest during the recently concluded session (1961) of Michigan's legislature. Such effort of the State Bar was that of proposing anew the adoption of a joint resolution, submitting to the people for approval an amendment of Michigan's Constitution reading relevantly as follows:

> "'Whenever the salary of one or more of the justices of the supreme court shall be increased the salaries of the other justices shall also be deemed to be increased to the extent necessary to afford equal salaries to them all.'"

Further evidence appears in the official minutes of the Board of Commissioners of the integrated Michigan Bar, recording start of that body's ultimately fruitless effort to stop such discrimination by political distinguished from judicial action. Shortly after the Dethmers-Kelly salary Act of 1960 (with its duplicate-of-1952 "no one else" section 2) was enrolled, then Associate and now Chief Justice Carr appeared before the Board to enlist its aid. The minutes read (July 8, 1960, p. 6):

> "Associate Justice Leland W. Carr was introduced by the President and he addressed the Board on a proposed amendment to Article XVI, section 3, of the Michigan Constitution, which amendment would require payment of equal salaries to all justices of the Supreme Court and would permit increases thereof after election or appointment. He explained the present inequitable situation and the futile attempts which had been made to rectify the inequality of salaries for equal work performed."[3]

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[3] Justice Carr was one of the members of the Court who, by the act of 1960, was due for the salary discrimination of which appellants complain. He has not joined us as a party and has risked no effort or contributed litigatory expenses; yet will receive the same fruits of success should we prevail. Already, on account of the temporary order below of March 23 (for payment of equal salaries to Michigan Supreme Court Justices), he with appellants received and accepted his salary at the uniform rate of $25,500 per annum until that order was dissolved (June 28) shortly after filing of Judge Cecil's opinion.

In the face of these recorded facts (and others to which we shall come) it is suggested that the presented questions are so unsubstantial as to require no further argument. Well, when *all* the members of a personally affected and personally embarrassed State Court of last resort resolve as quoted above, and when, three years later, the integrated Bar of that State and the present Chief Justice of that Court testify to like effect, it would seem that there is present a bit of record evidence, uncontradicted save only for conclusionary averments of an unsworn attorney general, tending reasonably to prove that the peculiar application to members of our Court, of the concluding sentence of section 3, is actionable under the equality clause.

This brings to the fore a fundamental error below, an understandable error which—as we shall presently demonstrate—probably would not have been made had Judge Martin lived to write the case he and his colleagues took under advisement last October. The court was *not* confronted by Judge Cecil's self-imposed alternative of either denying injunctive relief or holding such concluding sentence unconstitutional. We proceed, noting of due fairness that Judge Cecil (replacing Judge Martin after the latter's death) came into the case when a decision was badly needed and that he did not have the benefit of oral argument.

The plaintiffs did not ask, as all briefs made forcibly clear, *that such concluding sentence be declared unconstitutional.* That would destroy the concededly valuable prohibition against during-term salary increases which is applied properly and without discrimination to the multitude of Michigan public officers who are elected or appointed for less than 6 year terms. We did ask that such sentence be declared invalid in its application to 8-year elected members of the Supreme Court of Michigan. Such we be-

lieve was our right. As said in *Dahnke-Walker Co., v. Bondurant*, 257 US 282, 289:

> "That the statute was not claimed to be invalid *in toto* and for every purpose does not matter. A statute may be invalid as applied to one state of facts and yet valid as applied to another (citing cases)."

The corollary is that a litigant may challenge the constitutionality of a statute only in so far as it affects him. *Fleming v. Rhodes*, 331 US 100, 104. And see *Florida Lime and Avocado Growers v. Jacobsen*, 362 US 73, 84, holding that "if the constitutional claim against the state statute is substantial, a three-judge court is required to be convened and has jurisdiction, as we do on direct appeal, over *all* grounds of attack against the statute."

When an aggrieved person applies to a 3-judge court for injunctive relief against the enforcement by a State officer of a State statute, he is not obliged to take position that the assailed statute is a total nullity. In the historically eminent case of *Yick Wo v. Hopkins*, 118 US 356, the point was made this way (pp. 373, 374):

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

SECOND: The Taylor Case (pp. 8-10 of Motion to Affirm)

The majority opinion of this case (369 Mich 146) decided nothing except that the Michigan court of claims (a statutory court) was and is without jurisdiction to make declaratory judgments. Not one member of the Court disagreed on that score. The disagreement arose when 1 member wrote, for stated reasons (pp. 157-185), to withhold decision pending vainly suggested rehearing of an earlier and probably erroneous decision against the same Judge (*Taylor v. Auditor General*, 342 Mich 265).

It is true that the 5 signers of the majority opinion wandered deep into the daisies of dictum, yet even that dictum suggests no bar—nor could it—to plaintiff-appellant's present appeal to the Fourteenth Amendment. We need but add that the 3-times-up Taylor Case has just been resolved, finally and decisively, by the not-yet-reported case of *Taylor v. State of Michigan* (September 7, 1962).[4] The one and only point decided finally (by 4 to 2 vote without hint of touching upon any constitutional question) was that Judge Taylor, a now retired judge of the superior court of Grand Rapids, another statutory court, was not entitled to payment of "the same annual salary" by force of an 85-year-old statute which provided, and still provides (CLS Mich. 1956, §727.6):

> "The judge of said superior court shall receive from the treasury of the State of Michigan the same annual salary as may be payable to circuit judges, and payable in the same manner as are circuit judges."

[4] By letter to the clerk we shall furnish this citation just as soon as it appears in the NW2d advance sheets.

THIRD: The Attorney General's Treatment of the "Except Circuit Judges" exemption (pp. 11 and 12, of motion to affirm)

The attorney general says that "Adequate reasons appear in Michigan for the exclusion of circuit judges from the no increase provision of Section 3." He does *not* say what adequate reasons appear in Michigan for exclusion of Supreme Court Justices from the no-increase provision.

Now let us review more facts. Michigan circuit judges are 6-year term-elected by command of Michigan's Constitution (art 7, §9). The legislature may not, at will, lengthen or shorten the elective terms of circuit judges and all other constitutional officers; yet it may do so in the case of Supreme Court Justices (art 7, §2). Thus, *solely by legislative will,* Supreme Court Justices are elected for longer terms than are circuit judges, yet they have no like exemption from the no-increase prohibition.

Consider next the elective terms of all other constitutional officers of Michigan. All 144 legislative officers are elected for two year terms (art 4, §§2 and 3). So are all executive officers (art 6, §1) and so are all local officers (art 8, §3). The elective term of the superintendent of public instruction is 2 years (art 11, §2); that of the Regents of the University 8 years (art 11, §3); that of the State University Trustees 6 years (art 11, §7), and that of Probate Judges 4 years (art 7, §14).

Bearing in mind that the Regents and Trustees are elected to honorary and non-salaried offices requiring attendance of occasional and expense-paid meetings only, we find that Supreme Court Justices only are invidiously affected by the no-increase prohibition. Circuit judges, the only salaried and full-time officers who are elected for con-

stitutional terms of 6 years or longer, are exempted expressly. Salaried officials elected for terms shorter than those of Supreme Court Justices and Circuit Judges need no like exemption since they are regularly eligible for legislatively provided salary adjustments.

But what about the 8-year elected Supreme Court Justices? Can there be any rational reason for denying them salary increases for 8 years as others elected for shorter terms regularly receive such increases? There is no answer save the attorney general's naked *ipse dixit*. And we repeat: No classificationary discrimination like this ("except circuit judges") can be found in any State Constitution.

FOURTH: The Point that Michigan Supreme Court Justices So Far Have "Acquiesced" (p. 13 of Motion to Affirm)

This isn't quite true. Justices Voelker, Edwards and Talbot Smith did not "acquiesce." All three, having been elected for terms expiring respectively December 31, 1967 and December 31, 1965, left the Court, one after the other. And the undersigned appellants have never considered obeisance either. Each of us (former attorneys general of Michigan) have over the years witnessed the discriminatory effect of the salary increase act of 1952 and now the like act of 1960. We are in Court to arrest, if we can, more such calculated effort to control the Court by means of crass partisanship and arrogant discrimination.

There is another reason why the issue has moved from "acquiescence" to past due judicial action. Prior to the salary increase act of 1960 the discriminatory variation was never made more than $3,500 per year. Now it is twice that. If Justices Edwards and Voelker, Democratic nominated and elected in April of 1959 for 8 year terms

ending December 31, 1967, had remained on the Court and suffered what the attorney general would have this Court license, Justices Dethmers and Kelly, Republican-nominated and elected in April of 1961 for 8 year terms ending December 31, 1969, *each* would have received during the 6 years of common service exactly $42,000 more salary than Justices Edwards and Voelker, or a total of $84,000 more out of the State treasury. But then the attorney general—surely an honorable man—says the "disparity is but temporary."

The foregoing proves, in our respectfully submitted view, that disfavored Justices must either "take it," or "be good," or get off the Court. Which brings to mind Marshall's grim expressions concerning judicial independence (quoted from *O'Donoghue v. United States*, 289 US 516, 532):

> "The judicial department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all. Is it not, to the last degree important, that he should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience? • • • I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent judiciary."

CONCLUSION

Perhaps the substantiality of these equal protection questions may be judged best by the recorded and now stilled voice of one of the veteran and all time great judges of the Sixth Circuit; the Honorable John D. Martin of Tennessee, presiding below when this case was exhaustively argued

and discussed—without limitation as to time—on two separate occasions at Detroit, the last being September 25, 1961. Judge Martin posed these questions for former attorney general (now Justice) Adams and declared the meritorious convictions of the then assembled court this way:

> "Hon. John D. Martin: What can be more discriminatory than to give different salaries for the same function performed by the highest State Court, or to give different salaries to each of those men? What could be much more discriminatory than that?
>
> "They are the Justices charged with the final say about Michigan law, the final decision of Michigan cases that have no appeal to the Supreme Court of the United States. They have the final say on the law in Michigan to the extent the Federal Courts have to carry it out, under the Western Telegraph Company decision.
>
> "So, to have equality of work and an equality of pay, it seems to me to be absolutely required by the Fourteenth Amendment. That is why I said before there didn't seem to be any question of discrimination. It was there; there was discrimination; and what we were concerned with was jurisdiction, whether we had jurisdiction, whether we had jurisdiction of the case." (p. 12 of transcript). * * *
>
> "Hon. John D. Martin (interposing and addressing assistant to the attorney general Faville): All I said is that we apparently are against you on the proposition of there not being discrimination against these Judges, that it was in violation of the Fourteenth Amendment. But what I do say is that we were open-minded on the matter of jurisdiction. We are just giving you the benefit of that so that, in preparing your briefs, you will help us by hitting the hurdle" (p. 16 of transcript).

It was Judge Martin who, confined at the time by last illness, approved and directed immediate issuance of the temporary restraining order of March 23. By that order, starting April 30 and continuing as we have said until June 28, all eight members of the Michigan Supreme Court received uniform salaries at the rate of $25,500 per annum. Which is to say that, if the judgment below is summarily affirmed on motion, Justices Carr, Black and Kavanagh will be obligated to pay back at once not inconsiderable amounts to Michigan's treasury; to say nothing of that stark choice such an affirmed judgment will force—this coming February—upon all genuinely *independent* candidates for the office of Michigan Supreme Court Justice. That is the month when the major parties of Michigan will each nominate two candidates for election (April 1, 1963) to the Michigan Supreme Court for the two regular eight year terms ending December 31, 1971.

Plaintiff-appellants respectfully offer the foregoing totality of record facts as proof that the presented questions are of such substance as to preclude summary disposition thereof.

Respectfully submitted,

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September 12, 1962.

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